PUBLIC PROSECUTOR

v.

LAU KEE HOO

FEDERAL COURT, KUALA LUMPUR
SUFFIAN LP
WAN SULEIMAN FJ
SALLEH ABAS FJ
EUSOFFE ABDOOLCADER J
[CRIMINAL REFERENCE NO. 7 OF 1982]
25 OCTOBER 1982

CONSTITUTIONAL LAW: *Mandatory death sentence under Internal Security Laws - Whether unconstitutional - Possession of ammunition - Whether the Attorney-General may charge one under ISA and another under Arms Act.*

The respondent was charged under s. 57(1) of the Internal Security Act 1960, which carries a mandatory death sentence. At the trial the defence raised a preliminary point, contending that the mandatory death penalty under s. 57(1) was *ultra vires*, unconstitutional and violated Articles 5(1), 8(1) and 121(1) of the Federal Constitution. The trial was stayed and the issue was referred to the Federal Court for a decision.

Held:
The mandatory death sentence under the section is not ultra vires and does not violate the Articles referred to.

(1) Article 5(1)

(a) The Constitution itself envisages the possibility of Parliament providing for the death penalty, as Article 5(1) provides for deprivation of life according to the law. The ISA is legislation against subversion expressly authorised by Article 149 and therefore any provision under that is valid even if it is inconsistent with Article 5.

(b) The Court should decide cases before it in the light of our own Constitution, our own laws and the conditions in our own country. (*Michael de Freitas v. Benny* [1976] AC 239, *Runyown v. The Queen* [1967] AC 26, *Karam Singh v. Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129).

(2) Article 8(1)

The Article is concerned with equal punitive treatment for similar legal guilt. The Attorney-General has complete discretion whether to charge an accused under one or other law. All that equality before the law requires is that all cases be given unbiased consideration, uninfluenced by irrelevant factors. (*Teh Cheng Poh v. PP* [1979] 1 MLJ 50).

(3) Article 121(2)

There is nothing unusual in a capital sentence being mandatory. Furthermore, if the law providing for mandatory capital sentence was unconstitutional, every law imposing a mandatory fixed or minimum penalty even where it was not capital would be unconstitutional. (*Liyanage v. The Queen* [1967] 1 AC 259, 291; *Ong Ah Chuan v. PP* [1981] 1 MLJ 64).

[Appeal dismissed.]

Cases referred to:
Runyown v. The Queen [1967] AC 26
Bachan Singh v. State of Punjab [1980] AIR SC 898
Karam Singh v. Menteri Hal Ehwal Dalam Negeri [1969] 2 MLJ 129
Teh Cheng Poh v. PP [1979] 1 MLJ 50
Ong Ah Chuan v. PP [1981] 1 MLJ 64
Liyanage v. The Queen [1967] 1 AC 259

Legislation referred to:
Arms Act 1960, s. 8
Constitution of Trinidad and Tobago, s. 2(b)
Constitution of Rhodesia and Nyasaland, s. 60
Courts of Judicature Act 1964, s. 48(1)
Federal Constitution, art. 5(1), 8, (1), 42, 121(1), 145(3), 149, (1)
Penal Code [Ind], s. 302
Constitution of India [Ind], art. 14, 19, 21
Internal Security Act 1960, s. 57(1)
Law and Order Maintenance Act 1960 of Rhodesia and Nyasaland, s. 33A(1)
Dangerous Drugs Act 1973 [Sing], s. 3

For the respondent - Karpal Singh (Ngeow Yin Ngee & Gurbachan Singh with him)
For the appellant - Abu Talib Othman, (Phang Ah Hee with him) Attorney-General

JUDGMENT

Suffian LP:

Lau Kee Hoo ("the respondent") was charged with having under his control in a security area without lawful excuse or authority ammunition contrary to s. 57(1) ("the section") of the Internal Security Act 1960 ("ISA"), which carries a mandatory death sentence.

At the commencement of the trial, his Counsel Mr. Karpal Singh raised a preliminary point, contending that the mandatory death penalty was unconstitutional.

The learned Deputy Public Prosecutor was taken by surprise and on his application the case was adjourned to the following morning to enable him to "consult his seniors".

On the following morning the learned Attorney-General himself appeared with the learned Deputy. The Attorney-General suggested that this matter be referred to the Federal Court and that was how the Public Prosecutor came to be designated in these proceedings as the "applicant". The learned trial Judge agreeing stayed the proceedings, and acting under s. 48(1) of the Courts of Judicature Act No. 7 of 1964, referred the following question for our decision:

> Whether or not the mandatory death sentence provided under s. 57(1) of the Internal Security Act 1960 is *ultra vires* and violates Article 5(1), 8(1) and 121(1) of the Federal Constitution.

That day, after considering the rival arguments, we answered the question in the negative, that is to say we ruled that the mandatory death sentence under the section is not *ultra vires* and does not violate the Articles referred to. We now give our reasons.

Before doing so we would like to remark that the same question was considered by Hashim A. Sani J as he then was, on 12 August 1982 in Kuala Lumpur Civil Suit No. A12 of 1982 and by Ajaib Singh J on 16 September 1982 in a ruling on a preliminary issue in Ipoh Criminal Trial No. 12 of 1982.

The matter came before Hashim Sani J by way of a civil suit because the prisoner there had exhausted all the criminal remedies available to him including an appeal to this Court and another to the Pardons Board which were all unsuccessful. In the suit he sought a declaration that the mandatory death penalty under the section was unconstitutional, it being argued that the penalty contravened Article 5(1) and 8. As it happened, on application of the learned Attorney-General the statement of claim was struck out on the ground that it disclosed no cause of action, the learned Judge holding that the two Articles have not been contravened.

Before Ajaib Singh J the accused was charged with being in possession of a hand grenade in a security area without lawful excuse and without lawful authority under the section and his Counsel argued in a preliminary objection that the mandatory death penalty under the section was unconstitutional as it infringed Article 5(1), 8(1), 121(1) and 149(1). Ajaib Singh J too ruled that the Constitution had not been contravened.

Article 5(1)

First, we considered the argument based on Article 5(1) which provides:

> No person shall be deprived of his life ... save in accordance with law.

Thus it will be seen that the Constitution itself envisages the possibility of Parliament providing for the death penalty, so it is not necessarily unconstitutional. That this is so is fortified by reference to Article 42 which deals with the power of the Yang Dipertuan Agong, a Ruler and Governor to grant pardons, reprieves and respites. There is a campaign inspired from some Western countries to abolish the death penalty on the ground that it is cruel, but there is no provision in our Constitution corresponding to Article VIII of the American Constitution prohibiting "cruel and unusual punishment", nor similar to the provision contained in s. 2(b) of the Constitution of Trinidad and Tobago which was considered by the Privy Council in *Michael de Freitas v. Benny* [1976] AC 239. Nor does our Constitution contain any provision prohibiting "torture or inhuman or degrading punishment" like s. 60 of the Constitution of Rhodesia and Nyasaland which was considered by the Privy Council in *Runyown v. The Queen* [1967] AC 26. Mr. Karpal Singh did not however seek to argue that the penalty in question was cruel or unusual or was tantamount to torture or was inhuman or degrading; but simply because, as earlier stated, it was said to contravene certain provisions of our Constitution. In parentheses it may be remarked that one would not expect Parliament to countenance torture or any punishment that is inhuman or degrading; that as regards the death penalty which has existed here for well over a century, while it may be regarded as cruel in certain other countries, public opinion here is not quite ready to follow suit as far as certain grave offences are concerned, though it might do so in future; and that if the fathers of our Constitution had desired to abolish it they would have said so in the clearest of language.

The **ISA** is legislation against subversion expressly authorized by Article 149 of the Constitution. Mr. Karpal Singh conceded that the Act was constitutional; that being so we cannot see how it can be said that the impugned section is invalid as being contrary to Article 5(1); because the Article itself expressly provides that any provision of law enacted under the Article is valid "notwithstanding that it is inconsistent with Article 5".

It was however argued that the law authorized by the Article must, as stated in the Article, be one "designed to **stop** or **prevent** that action" meaning subversive action of the kind listed in Clause (1) of the Article, that for instance a person might be subjected to preventive

detention; that the action of which the respondent was accused had taken place, that therefore there was no question of preventing or stopping it, and that if at all he should be proceeded against not under the ISA but under other laws.

In our judgment there is no merit in this argument. True the ISA is designed to stop or prevent subversive action, but as the whole of it is valid and is still in force it can be used as authority for prosecuting persons who have completed acts made criminal by the Act, not only for stopping or preventing such acts. In any event, what better way is there of preventing similar acts than by prosecuting offenders such as the respondent?

Mr. Karpal Singh submitted that we should follow the minority judgment of Bhagwati J in *Bachan Singh v. State of Punjab* [1980] AIR., SC, 898, who ruled that s. 302 of the Penal Code [Ind] (dealing with murder), in so far as it provides for the imposition of the death penalty for that crime as an alternative to life imprisonment is *ultra vires* and void, being violative, he said, of Article 14 and 21 of the Indian Constitution "since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of death sentence". The learned Judge gave his detailed reasons two years later in August 1982, according to a newspaper report produced by Mr. Karpal Singh. One of the reasons highlighted was that as the law gave no guidelines, it operated arbitrarily; and that a bench of even the Supreme Court might in a particular case affirm it, while the same Court differently constituted might not. "The three worst Judges in this respect were Justices Vaidyalingam, Dua and Alagiriswamy, all now retired".

According to the newspaper report:

> The judgment was a long essay (174 pages) quoting ancient Indian classics, Jayaprakash Narayan, and a number of world thinkers and writers from all times. It juxtaposed the standard arguments of retentionists and abolitionists, siding passionately with the latter.

In our view that case can be distinguished because there the Court was dealing with law that provides for two alternative penalties, namely death or life imprisonment, whereas here we are dealing with law that provides for a mandatory death sentence.

In any event, we respectfully prefer the view of the majority (four Judges) to the contrary, that the death penalty under s. 302 of the Penal Code [Ind] did not contravene Article 19 and 21 of the Indian Constitution

For this purpose it is enough to reproduce only Clause (1) of Article 19 which reads:

> 19(1). All citizens shall have the right -
>
> (a) to freedom of speech and expression;
>
> (b) to assemble peaceably and without arms;
>
> (c) to form associations or unions;
>
> (d) to move freely throughout the territory of India;
>
> (e) to reside and settle in any part of the territory of India;
>
> (f) ...
>
> (g) to practise any profession, or to carry on any occupation, trade or business.

Article 21 is approximately the same as ours and reads:

> No person shall be deprived of his life or personal liberty except according to procedure established by law.

Next Mr. Karpal Singh brought to our attention another Indian case, in which according to a cutting from the **Indian Express** of 13 November 1980, one Mithu, a person who apparently while already in prison for life committed murder and was sentenced to death, moved the Supreme Court to declare unconstitutional the provision which makes death a mandatory sentence for murder committed by a life convict. His Counsel Mr. R.K. Jain contended that this provision was unconstitutional as the State had no power to kill its citizens, no procedure was envisaged for the trial, that a mandatory death sentence violated the rule of law and that murder by a life convict did not mean that the prisoner could not be reclaimed, and moreover the State's share in the crime (by not keeping offensive weapons away from the prisoner) was ignored. As the death sentence here is mandatory, like the death sentence under s. 57(1) of ISA, Mr. Karpal Singh suggested that we should await the decision of the Supreme Court [Ind] before making up our own mind.

With respect we declined to do so, because, first there is no knowing how long we would have to wait and, secondly we should decide cases before us in the light of our own constitution, our own laws and the conditions in our own country which are not necessarily the same as conditions in other countries.

Moreover as the late H.T. Ong CJ said at p. 141 in *Karam Singh v. Mentri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129, in which conflicting opinions of Indian Courts were cited and considered:

> ... in my humble opinion ... Indian Judges, for whom I have the highest respect, impress me as indefatigable idealists ...

Article 8(1)

Next we considered the argument based on Article 8(1) which reads as follows:

> All persons are equal before the law and entitled to the equal protection of the law.

Mr. Karpal Singh argued that a person found in unlawful possession of ammunition might be charged under the Arms Act 1960, which by s. 8 provides for a maximum penalty of imprisonment for seven years or a fine of RM10,000 or both, or under s. 57(1) of ISA and it was said that by charging the respondent under ISA the Attorney-General has deprived him of the protection of equality before the law guaranteed by Article 8(1).

It is now beyond dispute in the light of Article 145(3) and *Teh Cheng Poh v. PP* [1979] 1 MLJ 50, that the Attorney-General has complete discretion whether to charge the respondent under one or other law.

As regards the question whether or not a mandatory death sentence is constitutional in the light of Article 8 we would respectfully follow the reasoning of Lord Diplock when delivering the judgment of the Privy Council in an appeal from Singapore, *Ong Ah Chuan v. PP* [1981] 1 MLJ 64, holding that the mandatory death sentence for trafficking in heroin exceeding 15 grammes contrary to s. 3 of the Singapore Dangerous Drugs Act, 1973, was constitutional and not contrary to Article 9(1) and 12(1) of the Singapore Constitution which are in *pari materia* with our Article 5(1) and 8(1). We reproduce below relevant extracts from that judgment:

> Finally their Lordships will deal with the contention that the mandatory sentence of death upon conviction for trafficking in more than 15 grammes of diamorphine (heroin) is contrary to the Constitution ...

It was not suggested on behalf of the appellants that capital punishment is unconstitutional *per se*. Such an argument is foreclosed by the recognition in Article 9(1) of the Constitution that a person may be deprived of life 'in accordance with law'. As their Lordships understood the argument presented to them on behalf of the appellants, it was that the mandatory nature of the sentence, in the case of an offence so broadly drawn as that of trafficking created by s. 3 of the Drugs Act rendered it arbitrary since it debarred the Court in punishing offenders from discriminating between them according to their individual blame worthiness. This, it was contended, was arbitrary and not 'in accordance with law' as their Lordships have construed that phrase in Article 9(1): alternatively it offends against the principle of equality before the law entrenched in the Constitution by Article 12(1), since it compels the Court to condemn to the highest penalty of death an addict who had gratuitously supplied an addict friend with 15 grammes of heroin from his own private store, and to inflict a lesser punishment upon a professional dealer caught selling for distribution to many addicts a total of 14.99 grammes.

Their Lordships would emphasize that in their judicial capacity they are in no way concerned with arguments for or against capital punishment or its efficacy as a deterrent to so evil and profitable a crime as trafficking in addictive drugs. Whether there should be capital punishment in Singapore and, if so, for what offences are questions for the legislature of Singapore ...

All criminal law involves the classification of individuals for the purpose of punishment, since it affects those individuals only in relation to whom there exists a defined set of circumstances- the conduct and, where relevant, the state of mind that constitute the ingredients of an offence. Equality before the law and equal protection of the law require that like should be compared with like. What Article 12(1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others, it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.

The discrimination that the appellants challenge in the instant cases is discrimination between class and class; the imposition of a capital penalty upon that class of individuals who traffic in 15 grammes of heroin or more and the imposition of a penalty, severe though it may be, which is not capital upon that class of individuals who traffic in less than 15 grammes of heroin. The dissimilarity in circumstances between the classes of individuals lies in the quantity of the drug that was involved in the offence.

The question whether the dissimilarity in circumstances justifies any differentiation in the punishment imposed upon individuals who fall within one class and those who fall within the other, and, if so, what are the appropriate punishments for each class, are questions of social policy. Under the Constitution, which is based on the separation of powers these are questions which it is the function of the legislature to decide, not that of the judiciary. Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with Article 12(1) of the Constitution.

The social object of the Drugs Act is to prevent the growth of drug addiction in Singapore by stamping out the illicit drug trade and, in particular, the trade in those most dangerously addictive drugs, heroin and morphine. The social evil caused by trafficking which the Drugs Act seeks to prevent is broadly proportional to the quantity of addictive drugs brought on to the illicit market. There is nothing unreasonable in the legislature's holding the view that an illicit dealer on the wholesale scale who operates near the apex of the distributive pyramid requires a stronger deterrent to his transactions and deserves more condign punishment than do dealers on a smaller scale who operate nearer the base of the pyramid. It is for the

legislature to determine in the light of the information that is available to it about the structure of the illicit drug trade in Singapore, and the way in which it is carried on, where the appropriate quantitative boundary lies between these two classes of dealers. No plausible reason has been advanced for suggesting that fixing a boundary at transactions which involve 15 grammes of heroin or more is so low as to be purely arbitrary.

Wherever a criminal law provides for a mandatory sentence of an offence there is a possibility that there may be considerable variations in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real: it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculated greed. But Article 12(1) of the Constitution is not concerned with equal punitive treatment for equal moral blameworthiness; it is concerned with equal punitive treatment for similar legal guilt.

In their Lordships' view there is nothing unconstitutional in the provision for a mandatory death penalty for trafficking in significant quantities of heroin and morphine. The minimum quantity that attracts the death penalty is so high as to rule out the notion that it is the kind of crime that might be committed by a good samaritan out of the kindness of the heart as was suggested in the course of argument. But if by any chance it were to happen, the prerogative of mercy is available to mitigate the rigidity of the law and is the long-established constitutional way of doing so in Singapore as in England.

In the instant case the law required that sentences of death should be imposed. There is no substance in the contention that the requirement of the law is inconsistent with the Constitution. The appeals must be dismissed. (pp. 71 to 73).

In an earlier case *Runyown v. The Queen, supra* an appeal from Rhodesia and Nyasaland, the constitutionality of the death penalty prescribed by s. 33A(1) of the Law and Order Maintenance Act 1960, as amended, for certain types of arson was in question; and Lord Morris delivering the judgment of the Privy Council remarked:

A legislature must assess the situations which have arisen or which may arise and form a judgment as to what laws are necessary and desirable for the purpose of maintaining peace, order and good government. It can hardly be for the Courts unless clearly so empowered or directed to rule as to the necessity or propriety of particular legislation...if once laws are validly enacted it is not for the Courts to adjudicate upon their wisdom, their appropriateness or the necessity for their existence.

For our purposes the relevant principles which may be extracted from the above judgments are as follows:

1. Capital punishment is not unconstitutional *per se*.
2. In their judicial capacity Judges are in no way concerned with arguments for or against capital punishment. Capital punishment is a matter for Parliament. It is not for Judges to adjudicate upon its wisdom, appropriateness or necessity if the law prescribing it is validly made.
3. All criminal law involves the classification of individuals for the purposes of punishment.
4. Equality before the law and equal protection of the law require that like should be compared with like. What our Article 8(1) assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others.

5. Everybody charged under s. 57(1) of ISA is liable to the same punishment. Therefore it is not discriminatory.

6. It is the function of the legislature not judiciary to decide the appropriate punishment for persons charged under the ISA and the Arms Act.

7. Provided that the factor which Parliament adopts as constituting the dissimilarity in circumstances which justifies dissimilarity in punitive treatment is not purely arbitrary but bears a reasonable relation to the object of the law, there is no inconsistency with Article 8(1).

8. Article 8(1) is concerned with equal punitive treatment for similar legal guilt, not with equal punitive treatment for equal moral blameworthiness.

With regard to Mr. Karpal Singh's argument that the Attorney General might charge a person found offending against the impugned section in a security area under the ISA and another person under the Arms Act, 1960, which, as has already been noted, carries a lighter penalty, with respect we do not see any merit in this argument for as stated by Lord Diplock at p. 56 when giving the advice of the Privy Council in *Teh Cheng Poh v. PP:*

> There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another. All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration.

Article 121(1)

Finally, we come to the argument based on Article 121(1) which provides:

> (1) Subject to Clause (2) the judicial power of the Federation shall be vested in the (two) High Courts ... and in such inferior Courts as may be provided by federal law.

It was argued that the vesting of judicial power in the judiciary means that Judges should have a discretion as regards appropriate sentences, that by prescribing a mandatory death sentence under the impugned section Parliament has deprived Judges of that discretion, and that this is tantamount to the legislature usurping judicial power which has been entrusted by the Constitution to the Courts. In support Mr. Karpal Singh quoted this passage of the Privy Council in *Liyanage v. The Queen* [1967] 1 AC 259, 291, an appeal from Ceylon, where the constitutionality of the penalty prescribed by the Criminal Law (Special Provisions) Act No. 1 of 1962, as amended by the Criminal Law Act No. 31 of 1962, was in question:

> Quite bluntly, their aim (i.e., that of the two Acts) was to ensure that the Judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences.

With respect, that case is distinguishable. The two Acts were enacted to deal with persons involved in a specific event, namely the abortive *coup d'etat* of 27 January 1962, and were to cease to be operative after the conclusion of all legal proceedings connected with or incidental to any offence against the state committed on or about the date of the *coup* or from one year after the date of the commencement of the Act, whichever was later. The Acts

were expressed to be retrospective, allowed arrest without warrant for waging war against the Queen, and prescribed new minimum penalties for that offence and other offences and widened the scope of that offence. Here the ISA is not expressed to be retrospective nor is it intended to apply to participants in a particular event.

As stated by Lord Diplock at p. 72 in *Ong Ah Chuan v. PP* the Singapore case already referred to:

> There is nothing unusual in a capital sentence being mandatory. Indeed its efficacy as a deterrent may be some extent diminished if it is not. At common law all capital sentences were mandatory, under the Penal Code of Singapore the capital sentences for murder and for offences against the President's person still is.

Then His Lordship added the following significant words:

> If it were valid, the argument for the appellants (that a mandatory death sentence under the impugned section of the law in question there was unconstitutional) would apply to every law which imposed a mandatory fixed or minimum penalty even where it was not capital - an extreme position which Counsel was anxious to disclaim.

The foregoing are our reasons for answering the question posed in the negative.

Also found at [1983] 1 CLJ 21